SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2048

SPONSOR: Judiciary Committee and Senator Klein

SUBJECT: Evidence

DATE: April 5, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Forgas	Johnson	JU	Favorable/CS
2.				
3.				
4.				
5.				

I. Summary:

This bill amends subsection (24) of s. 90.803, F.S., which provides a hearsay exception for statements of certain elderly or disabled persons in limited circumstances. The bill provides definitions of "elderly person" and "mentally disabled person" and prescribes a list of conditions that must be considered by the court before allowing hearsay statements made by these persons into evidence.

This bill also amends s. 90.502, F.S., which is the section of the Florida Evidence Code providing a lawyer-client privilege. The bill would add subsection (6) to s. 90.502, F.S., to provide that a discussion or activity that is not a meeting for purposes of s. 286.011, F.S., shall not be construed to waive the attorney-client privilege.

The bill has an effective date of July 1, 2000.

This bill substantially amends the following section of the Florida Statutes: 90.502 and 90.803(24).

II. Present Situation:

Section 90.803(24), F.S., which is part of the Florida Evidence Code, currently contains an exception to the hearsay rule for statements of elderly persons or disabled adults made under certain conditions. Basically, it allows an out-of-court statement made by an elderly person or disabled adult, as defined in s. 825.101, F.S., which describes any act of abuse, neglect, assault, battery, sexual battery, or any other crime of violence, to be admitted in evidence in any civil or criminal proceeding.

Prior to admitting the hearsay statement, the court must conduct a hearing outside the presence of the jury to determine whether the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental

and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate. Additionally, the elderly person or disabled adult must either testify at the trial or be unavailable provided there is corroborative evidence of the abuse or offense. Unavailability can include situations where the elderly person or disabled adult cannot testify without the occurrence of severe emotional, mental or physical harm.

Paragraph (c) of s. 90.803(24), F.S., requires the court to make specific findings of fact on the record as to the basis for its ruling under this subsection. In a criminal action, the defendant must be notified no later than 10 days before trial that the state will use statements at trial pursuant to this subsection.

In the recent case of *Conner v. State*, 24 Fla. L. Weekly (S)428 (Sept. 16, 1999), the Florida Supreme Court declared the hearsay exception for elderly persons in s. 90.803(24), F.S., to be unconstitutional in criminal cases. The court ruled the statute violated the defendant's constitutional right to confront adverse witnesses at trial. *See,* 6th Amendment, United States Constitution; Article I, s. 16(a), Florida Constitution. The court declined to reach the constitutionality of the statute as it applies to disabled adults or as it applies generally to civil cases.

The court in *Conner* laid out the constitutional framework surrounding the constitutional right to confront and cross-examine witnesses and analyzed s. 90.803(24), F.S., in relation to this framework. In doing so, the court noted that the elderly person hearsay exception was similar to, and tracked much of the language of, the child hearsay exception in s. 90.803(a), F.S., which the court had previously ruled to be constitutional in the case of *Perez v. State,* 536 So.2d 206 (Fla. 1988). However, the court found the elderly person hearsay exception to be much broader than the child hearsay exception, with some very critical differences between the two exceptions.

The court in *Conner* found the following differences between the two exceptions to be significant:

- The child hearsay exception applied only to children under 12 whereas the elderly person exception applied to any adult over 60, which is a much broader class of declarants;
- The child hearsay exception was limited to statements about child abuse, child neglect, or sexual abuse whereas the elderly exception would be broadly applicable to a wide variety of crimes not restricted to the elder abuse context; and
- The list of factors the court may consider to determine the reliability of the hearsay statement did not guarantee the reliability of the statement as they would, in fact, render the statements less reliable than subjecting them to adversarial testing.

The court concluded by stating that "...any state interest in prosecuting crimes against the elderly cannot constitutionally justify the abrogation of a defendant's most basic constitutional right. If the need to prosecute crimes constituted a sufficient interest to justify the admission of the hearsay statements of witnesses and victims, the state and federal constitutional rights of confrontation would be substantially eviscerated."

Attorney-Client Privilege

At common law, communications between attorney and client were privileged in order to allow the client to receive effective legal advice and to permit a lawyer to prepare for litigation. Total disclosure by the client is encouraged when the client knows that disclosure of any communication between the client and the attorney may be prevented. Any harm to the search for justice by limitations on inquiry into all relevant facts is outweighed by the benefits of full disclosure by the client. When an attorney is aware of all the facts in a matter, the attorney can discourage useless litigation or encourage the pursuit of a valid claim. *Erhardt, Florida Evidence* s. 502.1 (1999 Ed.), citing *Brookings v. State,* 495 So.2d 135, 139 (Fla. 1986). For the most part, the attorney-client privilege is now codified in s. 90.502, F.S., which is part of the Florida Evidence Code.

The Florida Evidence Code, located in chapter 90 of the Florida Statutes, replaces and supersedes the existing statutory and common law which is in conflict with its provisions. *See,* s. 90.102, F.S. Section 90.103(1), F.S., provides that the Code is applicable in the same proceedings in which the rules of evidence were applied prior to the adoption of the Code. Judicial decisions, statutes, and rules of court have all spoken to different proceedings in which the strict rules of evidence, and therefore the Code, are inapplicable. Some of the proceedings where the Code is inapplicable are grand jury proceedings, extradition proceedings, preliminary hearings in criminal cases, proceedings involving sentencing, the granting or revoking of probation, the issuance of arrest and search warrants, bail proceedings, habitual offender proceedings, and bar disciplinary proceedings. *Erhardt,* at s. 103.1, and cases cited therein.

Section 90.502, F.S., which contains the attorney-client privilege, generally provides that neither an attorney nor a client may be compelled to divulge confidential communications between a lawyer and client which were made during the rendition of legal services. There must be an attorney-client relationship before the privilege exists. *Erhardt,* at s. 502.2. Section 90.502(1)(b), F.S., defines a client as including any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the view of obtaining legal services or who is rendered legal services. Thus, the section includes governmental bodies and units as clients who possess a lawyer-client privilege.

A corporation, governmental entity, or other legal entity differs from a natural person in that it can only speak through its employees. In order for an attorney to communicate with a governmental entity who is a client, the attorney must communicate with governmental employees. However, not all employees may be associated closely enough with the governmental authority to be considered as speaking for the client. Section 90.502, F.S., does not specifically address the issue of which corporate or governmental employees have a sufficient identity with the corporation or government so that communications between the attorney and certain employees will be protected by the attorney-client privilege.

The Florida Supreme Court discussed the application of the attorney-client privilege in the corporate context in the case of *Southern Bell Tel. & Tel. Co. v. Deason,* 632 So.2d 1377 (Fla. 1994). The opinion focused upon the need for the free flow of information between attorney and client to enable the attorney to provide legal advice. The following criteria were established by the court to determine whether communications in the corporate context are protected by the attorney-client privilege:

1) The communication would not have been made but for the contemplation of legal services;
2) The employee making the communication did so at the direction of his or her corporate superior;
3) The superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
4) The content of the communications relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;
5) The communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Deason, at 1383.

The power to assert the corporation's attorney-client privilege resides in the corporation's board of directors. A person who is a shareholder and a director can not waive the corporation's privilege. *See, e.g., Tail of the Pup, Inc., v. Webb,* 528 So.2d 506 (Fla. 2d D.C.A. 1988).

The Attorney-Client Privilege, the Sunshine Law and the Public Records Act

Two statutory enactments, the Government in the Sunshine Law in s. 286.011, F.S., and the Public Records Act in Chapter 119, F.S., significantly restrict the ability of a Florida governmental body to assert the attorney-client privilege. The Florida Sunshine Law requires that meetings of governmental bodies at which official actions will be taken be open to the public. The Florida Supreme Court considered the issue of the effect of this legislative action upon the State of Florida's attorney-client privilege in *Neu v. Miami Herald Publishing Co.,* 462 So.2d 821 (Fla. 1985). The court held that the Sunshine Law applies to meetings between a city council and a city attorney to discuss the settlement of pending litigation to which the city is a party and that, therefore, these meetings cannot be confidential. Since the communications are not confidential, they cannot be protected by the state's attorney-client privilege. The Supreme Court rejected arguments that in codifying the attorney-client privilege in s. 90.502, F.S., the Legislature intended to create an exception to the Sunshine Law. Although the court commented that the result of its holding would give the government's adversary an unfair advantage, it suggested that only amendment of the statutes or constitution could result in private meetings with the attorney.

Subsequently, s. 286.011(8), F.S., was added by the 1993 session of the Legislature to provide a limited exemption from the Sunshine Law for private meetings between a governmental agency and its chief administrative or executive officer and the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency. *See,* ch. 93-232 L.O.F. This subsection requires certain conditions to be met, including: meeting certain notice requirements; limiting the subject matter of the meeting to settlement negotiations or strategy sessions relating to litigation expenses; and preparing a transcript of the meeting. Subsection (8) also requires the transcript of the meeting to be published when the litigation is concluded.

Chapter 119, F.S., the Public Records Act, opens all state, county, and municipal records for inspection by any person, with certain stated exceptions. In *City of North Miami v. Miami Herald Publishing Co.,* 468 So.2d 218 (Fla. 1985), the Supreme Court considered the issue of whether

the Public Records Act applied to files and records of confidential communications between the state and its attorneys, which the attorney-client privilege would otherwise protect. The Supreme Court held that the attorney-client privilege in s. 90.502, F.S., does not exempt written communications between the government and its lawyers from disclosure under the Public Records Act. The Supreme Court ruled that, since the Legislature has determined that public records are not confidential, the attorney-client privilege does not protect the records.

Nevertheless, the Supreme Court recognized that s. 119.07(3)(o), F.S. (currently s. 119.07(3)(l)1., F.S.), did create an opinion work product exception to the Public Records Act. Under this exception, there are three requirements to exempt a public record from the Act so that a claim of privilege may be asserted. First, the record must be one that the agency attorney prepared or expressly directed be prepared. Second, the record must reflect a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency. Third, the record must be one which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or in anticipation of imminent civil or criminal litigation or adversarial administrative proceedings. Subsection 119.07(3)(l)1., F.S., provides that the work product exemption continues only until the conclusion of the litigation or adversarial administrative proceeding.

However, not all materials in the files of a governmental attorney are public records. In *State v. Kokal*, 562 So.2d 324, 327 (Fla. 1990), the Supreme Court approved the definition of public records as materials "prepared in connection with official agency business which are intended to perpetuate, communicate, or formalize knowledge of some type." The following materials in lawyers' files have been determined not to be public records: drafts and notes intended as mere "precursors" of government records or designed to aid the attorney in remembering things; rough drafts; notes to be used in preparing other documentary materials; tapes and notes that a secretary takes for dictation; an outline of evidence which the attorney may need for trial; a list of questions the county attorney planned to ask a witness: and a proposed trial outline. *See, e.g., Orange County v. Florida Land Co.*, 450 So.2d 341, 344 (Fla. 5th D.C.A. 1984); *Bryan v. Butterworth*, 692 So.2d 878, 880 (Fla. 1997).

Section 119.07(3)(b), F.S., exempts from public disclosure criminal investigative and intelligence information as long as the information is active. Section 119.011(3)(d)(2), F.S., defines active as relating to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future. In *State v. Kokal*, 562 So.2d 324, 326 (Fla. 1990), since the defendant was seeking post-conviction relief, the Supreme Court compelled disclosure to the defendant of public records in the file of the state attorney relating to the defendant's conviction. The court reasoned that after a defendant's conviction and sentence have become final, the criminal investigative information is no longer active even though a defendant may file, or has filed, a motion for post-conviction relief.

Section 624.311(2), F.S., provides a specific exception to the Public Records Act (s. 119.07(1), F.S.) for the records of insurance claim negotiations of any state agency or political subdivision. The confidentiality extends until termination of all litigation and settlement of all claims arising out of the incident. One commentator has indicated that it is important to note that this section only provides that the records are exempt from the Public Records Act. *Erhardt*, at s. 502.4. Because of the exemption, the records are subject to the general claim of attorney-client and work product

privileges. *Id.* The section does not provide that the records are privileged. *Id.* If the state or one of its subdivisions wishes to assert the attorney-client privilege, whether the privilege applies depends on the other general principles of s. 90.502, F.S. *Id.*

The Attorney General has issued several recent opinions on the attorney-client privilege as it applies to governmental entities. In *Attorney General Opinion 97-61* (1977), the Attorney General answered questions from the Pinellas County School Board attorney concerning communications between a member of the school board or the school superintendent and the school board attorney. After determining that school boards are subject to the terms of s. 286.011, F.S., and that discussions involving the school board and its attorney must be held in open meetings, except when the discussions relate to settlement negotiations or strategy sessions concerning litigation expenditures, the Attorney General concluded that no attorney client privilege attaches to public conversations. Therefore, communications regarding school business between individual members of the school board and the school board attorney are not privileged communications since it is the school board as a body that is the client, and these meetings are subject to the Sunshine Law.

The Attorney General also opined that conversations between the school superintendent and the school board attorney are not subject to the requirements of s. 286.011, F.S., because the superintendent is an employee of the board. *See, e.g., Deerfield Beach Publishing, Inc. v. Robb,* 530 So.2d 510, 511 (Fla. 4th D.C.A. 1988) (requisite to application of the Sunshine Law is a meeting between two or more public officials.) However, while these conversations may not be subject to the Sunshine Law, they are also not privileged conversations for which confidentiality may be asserted. A privileged communication between a lawyer and client is confidential if it is not intended to be disclosed to third persons. According to the Attorney General, since the privilege belongs to the client school board the privilege can only be asserted for the narrow exceptions found in s. 286.011, F.S., (i.e. discussions about settlement negotiations or litigation expenditures between the board and its attorney.) The Attorney General concluded that the attorney's legal services are not personal to the individual members of the board or the school superintendent and should not be the subject of requests for legal advice from the school board attorney.

In 1998, in *Attorney General Opinion* 98-21, the Attorney General provided an opinion regarding whether the exemption afforded by s. 286.011(8), F.S., for pending litigation applied when no lawsuit had been filed but the parties believed litigation was inevitable. The Attorney General stated that Florida courts have held that the Legislature intended a strict construction of the exemption afforded by s. 286.011(8), F.S. *See, School Board of Duval County v. Florida Publishing Company,* 670 So.2d 99 (Fla. 1st D.C.A. 1996). The Attorney General was of the opinion that the exemption afforded by s. 286.011(8), F.S., did not apply when no lawsuit had been filed even though both parties believed litigation was inevitable. The Attorney General indicated that, had the Legislature intended to extend the exemption to include impending or imminent litigation, it could have easily so provided in express terms. The Attorney General noted the Legislature had taken that exact measure in s. 119.07(3)(l)1., F.S., (Public Records Act), where it clearly indicated that the limited work-product exemption provided for therein applied not only to records "prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings," but also to records that were "prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings[.]"

III. Effect of Proposed Changes:

The bill substantially modifies s. 90.803 (24), F.S., in a number of ways. First, it provides specific definitions of elderly persons and mentally disabled persons. Elderly person means a person 60 years of age or older who suffers from the infirmities of aging as manifested by advanced age, organic brain damage, or other mental or emotional dysfunctioning to the extent that the person's ability to provide adequately for his or her own care or protection is impaired. Mentally disabled person means a person who suffers from a condition of mental or emotional incapacitation due to a developmental disability, organic brain damage, or mental illness which restricts the person's ability to perform the normal activities of daily living.

The bill narrows the types of acts described in the declarant's statement which are covered as an exception to the hearsay rule. More specifically, the offenses of battery, aggravated battery, assault, aggravated assault and sexual battery are deleted. In their place, the bill adds sexual offenses to the acts of abuse, neglect and exploitation which are currently covered by the hearsay exception.

The bill makes several modifications to the factors the court must consider when determining whether the hearsay statement will be admissible. The bill provides that the time, content, and circumstances of the statement must provide such sufficient safeguards of reliability "that adversarial testing of the statement in court would add little to its reliability." The bill adds an additional requirement that the court must consider the declarant's mental age and capacity and the reliability of the assertion under the totality of the circumstances.

Additionally, the court may consider the statement's spontaneity, whether the statement was made at the first available opportunity following the alleged incident, whether the statement was elicited in response to questions, the mental state of the elderly or mentally disabled person, when the incident was reported, whether the elderly or mentally disabled person used terminology unexpected of a person with his or her disability, the motive or lack thereof to fabricate the statement, the vagueness of the accusations, the possibility of any improper influence on the elderly person or mentally disabled person, and contradictory statements.

The act has an effective date of July 1, 2000. In *Glendenning v. State*, 536 So.2d 212 (Fla. 1988), the Florida Supreme Court found that the child hearsay exception in s. 90.803(23), F.S.. could be applied retroactively to offenses occurring before the effective date of the section as the retroactive application would not violate the prohibition against *ex post facto* laws. The court, relying on two U.S. Supreme Court decisions, determined the child hearsay exception was procedural in nature as it did not affect substantial personal rights. *Id.* at 215. The court explained that the crime for which the defendant was charged, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish guilt, all remained unaffected by the enactment of s. 90.803(23), F.S. *Id.* Additionally, s. 90.803(23), F.S., left unimpaired the jury's right to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the state must overcome the presumption of innocence and establish guilt beyond a reasonable doubt. *Id.* Accordingly, the bill will be able to be applied retroactively.

The bill also adds subsection (6) to s. 90.502, F.S. It provides that "[a] discussion or activity that is not a meeting for purposes of s. 286.011, F.S., shall not be construed to waive the attorney-client privilege established herein." The bill also states that it shall not be construed as an exemption, or an alteration of an existing exemption, to ss. 119.07 or 286.011, F.S. Accordingly, a governmental entity may be able to claim the attorney-client privilege as provided in s. 90.502, F.S., in any proceeding to which the Florida Evidence Code applies. The governmental entity will have to prove, pursuant to s. 90.502(1)(c), F.S., that the communication is confidential and is in furtherance of the rendition of legal services to the governmental entity. This standard arguably will be judged in accordance with the Florida Supreme Court's ruling in *Deason,* which construed the attorney-client privilege in the corporate setting.

Assuming the communication falls within the ambit of the guidelines established in *Deason,* a governmental entity will be able to prevent disclosure of verbal discussions between governmental attorneys and all governmental employees. For example, in a personal injury lawsuit involving the governmental entity's alleged negligent maintenance of a floor resulting in a person slipping and falling, a governmental attorney will be able to prevent discovery of the attorney's communications with an employee responsible for maintaining the floor in a safe condition. Under current law, this type of discussion would be discoverable as it does not fall within the exemption contained in s. 286.011(8), F.S., and it is not deemed a confidential communication.

The bill has an effective date of July 1, 2000, but does not expressly state whether it will apply retroactively to existing proceedings or only prospectively to proceedings arising on or after July 1, 2000. Typically, matters pertaining to substantive law are applied prospectively. *See, Van Bibber v. Hartford Accident & Indemnity Insurance Co.,* 439 So.2d 880 (Fla. 1983). Nevertheless, if a statute is found to be remedial in nature it can be retroactively applied in order to serve its intended purpose. *See, Village of El Portal v. City of Miami Shores,* 362 So.2d 275 (Fla. 1978). In *City of Orlando v. Desjardins,* 493 So.2d 1027 (Fla. 1986), the Florida Supreme Court ruled that the statutory exemption to the Public Records Act for records prepared by governmental attorneys in anticipation of, or during, litigation could be applied retroactively because it was addressed to precisely the type of remedial rights arising for the purpose of protecting or enforcing substantive rights.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

It remains unclear whether the bill will cure the constitutional defects in s. 90.803(24), F.S., found by the court in *Connor, supra.* The bill still applies to a much broader class of persons, i.e. adults over 60, than the child hearsay exception, i.e., children under 12, and the court in *Conner* considered this to be significant.

Additionally, the court in *Conner* noted that, in addition to the listed statutory factors the court may consider when assessing reliability in the child hearsay context, the court must also consider a permissive list of additional factors that were set forth in the case of *State v. Townsend,* 635 So.2d 949 (Fla. 1994). The bill now contains a list of additional factors the court may consider which is very similar to the conditions set forth in *Townsend.* However, it is unknown whether this list will meet constitutional muster. The court in *Conner* stated that "[h]owever, unlike the child hearsay context, we are unable to formulate a list of permissible considerations that would ensure the reliability of a hearsay statement made by an elderly adult to the extent that 'adversarial testing would add little to its reliability'...The circumstances that might necessitate the use of the statement--such as the mental infirmity or physical infirmity of the elderly person--would be the very circumstances that would render the statement less reliable. In this context, adversarial testing would significantly add to the reliability of the trial."

Furthermore, the court in *Conner* found the policies that supported upholding the narrowly drawn child abuse hearsay exception were not present in the elderly adult context. The court stated that "[i]n contrast to the child abuse context, section 90.803(24) broadly applies to statements describing a wide range of crimes not necessarily unique to adults over the age of sixty." It is unknown whether a court will construe acts of abuse, neglect, exploitation, or sexual offenses, as being unique to elderly persons who suffer from mental or emotional dysfunctioning and mentally disabled persons.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill's provisions for s. 90.502(6), F.S., should make it easier for governmental attorneys to have confidential discussions with both upper and lower echelon governmental employees. The bill should result in an even playing field in those proceedings under the Florida Evidence Code to which the attorney-client privilege applies, as contained in s. 90.502, F.S., as it has a salutary and protective purpose of mitigating the harsh provisions of the Florida Public Records Act and the Government in the Sunshine Law as applied to public entities' confidential communications. *See, Desjardins,* at 1028-1029.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.